LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 14 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 827

CHASE CAPITAL CORP., dba QUAIL VALLEY COUNTRY CLUB,
Petitioner,

vs.

A. J. BUMB, receiver-trustee for CHASE CAPITAL CORPORATION, a debtor-bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT.

MORRIS LAVINE,
215 West Seventh Street
Suite 620
Los Angeles 44, California
Attorney for Petitioner.

WESTERN PRINTING CO., WHITTIER—OX 9-1722

TOPICAL INDEX

Page

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth District 1

Jurisdiction 2

Opinion Below 3

Constitutional Provisions and Statutes Involved 3

The Facts 4

Questions Presented 8

Reasons for Granting Writ 10

Reasons for Granting the Writ 17

TABLE OF CASES AND AUTHORITIES CITED

Cases

Page

Collier on Bankruptcy, 14th Ed., Vol. 8, page 202 21
Commonwealth of Massachusetts v. Thompson, 190 F. 2d 10, 11 10
Continental Bank v. Chicago., 294 US 648 21
Corporate Reorganization, 63 Harvard Law Rev. 1056 11
Grannis v. Ordean, 234 U.S. 385 12
In re Evenod Perfumer (C.C.A.N.Y.) 67 F 2d 878 19
In re Huntington & Broad Top Mountain R & R Coal Co., 213 F. 2d 411 19
In re National Realty Trust, 167 F. 2d 440 11
In re Peterson's Motor Express, 84 F. Supp. 230 11
In re Pure Penn Petroleum Co., 188 F. 2d 851 ..... 11, 16
In Schroeder v. New York, 371 U.S. 208, 9 L. ed. 2d 255 at 258 11
In re Susquehannah Chemical Corp., 81 F. Supp. 1 (aff 174 F. 2d 783) 10
International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Quick Charge, 168 F. 2d 513 11
Milliken v. Meyer, 311 U.S. 457 12
Mintz v. Irving Trust Co., 54 S. Ct. 455, 291 US 671, 78 L. ed. 1060 19
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. ed. 865, 873, 70 S Ct 652 12

Page

Newman & Bisco v. Realty Associates Securities Corp., 173 F. 2d 609 10
New York v. New York, N.H. & H.R. Co., 344 US 293, 296, 97 L. ed. 333, 336, 73 S Ct 299 13
People v. Karpel, No. 809 Mics., 372 U.S. 703, 10 Fed. 2d 1024 U.S. 818, 10 Fed. 2d 1043 6
Priest v. Las Vegas, 232 U.S. 604 12
Powell v. Alabama, 287 US 45, 77 L. ed. 158 18
Roller v. Holly, 176 U.S. 398 12
Standard Oil Co. v. U.S., 221 US 1 18
U.S. v. Union Supply Co., 215 US 50, 54 L. ed. 87 18
Walker v. Hutchinson City, 352 US 112, 1 L. ed. 178, 77 S Ct 200 14

Authorities

Page

Bankruptcy Act, Chapter X 5, 7, 8
Bankruptcy Act, Chapter XI 1, 4, 5, 8, 10, 15, 17, 23
Bankruptcy Act, Section 24 (c), Title 11, U.S. Coped 2
Bankruptcy Act, Sections 58, 59(g) and 376 3
Bankruptcy Act, Section 334 5
Bankruptcy Act, Section 376 20
Constitution of the United States, Fifth Amendment 3, 8, 17, 18
General Corporation Law of Calif., Sec. 3901(b) 17
General Corporation Law of the State of California, Section 3901 3
Rules of Civil Procedure, Rule 73 2

IN THE

Supreme Court of the United States

October Term, 1964

No.....

CHASE CAPITAL CORP., dba QUAIL VALLEY COUNTRY CLUB,
Petitioner,

vs.

A. J. BUMB, receiver-trustee for CHASE CAPITAL CORPORATION, a debtor-bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT.

Your petitioner, Chase Capital Corporation, respectfully petitions for certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment of that court affirming an order and judgment of the United States District Court, Southern District of California, Central Division, which in turn affirmed an order of a referee which adjudicated the corporation a bankrupt, after a petition for relief under Chapter XI of the Bankruptcy Act.

JURISDICTION

The judgment of the Court of Appeals was rendered October 6, 1964. A petition for extension of time to file a petition for rehearing was duly and regularly filed on November 5, 1964 and denied November 16, 1964. No petition for rehearing has therefore been filed in this case. A petition for certiorari is being filed within 90 days of the judgment of the Court of Appeals.

Jurisdiction is governed by Section 24(c) of the Bankruptcy Act., Title 11, U.S. Codes, and by Rule 73, Rules of Civil Procedure for the District Courts of the United States and Title 28, Section 1254, U.S. Codes.

OPNION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in 336 F.2d 1000. A copy of said opinion is attached hereto as Appendix A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Fifth Amendment to the Constitution of the United States; Bankruptcy Act, Sections 58, 59(g) and 376; and Section 3901 of the General Corporation Law of the State of California, copies of all of which are attached hereto as Appendix B.

THE FACTS

The petitioner, Chase Capital Corporation, dba Quail Valley Country Club, is a California corporation, organized under the laws of the State of California in 1939. It has at least 500 to 600 stockholders and, according to the attorney for the Securities and Exchange Commission, there are at least 2000 stockholders. (R. 179) It has been engaged in the business of subdividing real property and selling lots in California for housing development and also operating the Quail Valley Country Club on some of its property. Its assests have been appraised at in excess of $5,000,000, although the attorney for the S.E.C. claimed it was even greater. According to the attorney for the S.E.C., there are 150 trust deed holders that hold securities, many of them purchased through Trustors' Corporation. There are also 3000 lot holders that have claims. (R. 186)

On October 4, 1962, the corporation, needing money to meet outstanding obligations but having assets, according to its schedules, of the value of $7,390,734.55 in the form of real estate which was more or less frozen, and other forms not immediately liquid, and owing $2,152,112.49, the then Board of Directors of the corporation, without notice to the stockholders of any kind or character, and without their vote or approval, petitioned the Bankruptcy Court for leave to proceed under Chapter XI of the Bankruptcy

Act. It appeared that if it could continue to operate it would be able ultimately to meet its obligations. Its purpose in petitioning was not to liquidate but to reorganize. (See statement of attorney in Appendix C.)

From its state of affairs it appeared to be "property poor" but, upon sale of the property and various assets, to be able to continue successfully to carry out its functions and to meet all of its obligations.

On October 23, 1962, the Referee in Bankruptcy to whom the case was assigned sent out notice to creditors, to-wit: those who were listed in the schedule of affairs of the corporation. The stockholders of the corporation were not listed and received no notice then or at any time since that time. Their addresses were not given and no notice of any kind was ever sent to them regarding the Chapter XI proceedings. It is the contention of the petitioner that they were and are interested parties and entitled to notice under the provisions of Section 334 of the Bankruptcy Act.

C. J. Odenweller, attorney for the Securities and Exchange Commission, intervened on August 21, 1963, at a hearing held by the Referee in Bankruptcy and moved on behalf of the stockholders that the cause be transferred to Chapter X of the Bankruptcy Act. Considerable discussion took place on this subject. (R. 166, et seq.) After a lengthy hearing and discussion the Referee denied the motion.

The then corporate directors had selected an attorney named Joseph Bernfeld to act on behalf of the corporation. Confusion followed and existed between the directors, who were the corporation's original directors at the time of the petition, and some who followed, and who claimed to have authority and there was confusion as to who was actually attorney for the corporation and authorized to speak for it. (See volume I of transcript of record)

In California, neither the officers nor stockholders who are not attorneys at law can appear in any court proceedings to represent the corporation nor to speak for it. They have no voice before a court in regard to the corporate affairs. Even the attorney must have corporate authority by resolution. The corporation must be represented solely by an attorney.

> *People v. Karpel,* No. 809 Misc., 372 U.S. 703, 10 L.Ed. 2d 1024; 374 U.S. 818, 10 L.Ed. 2d 1043.

The case, originally before Referee Rifkind, was transferred to another Referee, James E. Moriarty, who on May 27, 1964 gave notice to creditors but no notice to any of the stockholders. Referee Rifkind, who was the first Referee, appointed A. J. Bumb as Receiver and Mr. Bumb immediately proceeded to take into his possession and control all of the assets of Chase Capital Corporation and thereafter to direct its affairs without any notice to any of the stockholders or any consent by them. He shut down the complete operations of the corporation.

Although it appears from the record that corporate reorganization was the object of the petition, in order to enable the corporation to continue operating, to sell its real estate and to pay off a little more than $2,000,000 of debts out of more than $7,000,000 of assets, the cause proceeded with dispute and without any representation by any of the stockholders in the matter and without any notice to any of the stockholders.

At the hearing on August 21, 1963, at which the Referee denied the attorney for the S.E.C. his request to transfer the cause to Chapter X and allow the stockholders to have their voice, the Referee at the conclusion of the hearing immediately and summarily adjudicated the corporation a bankrupt. This was without any notice to any of the stockholders, without any hearing or without any further notice to any of the creditors and without any knowledge or consent on the part of the officers of the corporation (R.T. Aug. 21, 1963, p. 257, lines 24-25), as to whether the corporation was bankrupt.

Upon the orders of the Referee, the Receiver was ordered to remove all the records from their location and put them under lock and key and "make sure that nobody gets in there" (R.T. 259).

An appeal was taken to the United States Court of Appeals by counsel not involved in the operation.

QUESTIONS PRESENTED

1. Whether stockholders of a corporation are interested parties in a proceeding commenced in the Bankruptcy Court by a corporation, by its directors, by a Chapter XI of the Bankruptcy Act, and whether they are entitled to notice and an opportunity to be heard and a voice in the proceeding before the corporation is adjudged a bankrupt.

2. Whether the Referee erred and the United States District Court erred in refusing to grant the motion of the S.E.C. on behalf of the stockholders to dismiss the proceedings under Chapter XI and transfer the cause to Chapter X.

3. Whether the United States District Court had jurisdiction summarily to proceed to adjudicate the corporation bankrupt and take control of all the assets of the corporation, with complete power of sale and disposition of those assets, without noticing stockholders and an opportunity to be heard by them of this determination and to declare the corporation "bankrupt" with a power of sale of all of its assets.

4. Whether the corporation and its stockholders were deprived of due process of law guaranteed by the Fifth Amendment of the Constitution of the United States where none of the officers or stockholders were given notice and a hearing on the subject of whether it was to be adjudicated a bankrupt and whether it was, in fact, a bankrupt.

5. Whether the corporation had the right to be represented by counsel of its choosing and one that was approved by a majority of the stockholders.

6. Whether such a proceeding as was had in this case and this determination that the corporation was bankrupt, was arbitrary and capricious, and violated the Fifth Amendment U.S. Constitution.

7. Whether the stockholders and other interested parties have a right to a jury trial on the issue of whether the corporation was actually insolvent and whether these proceedings, as had in this case, deprived the stockholders and other interested parties of their rights to test the question of insolvency by a jury trial.

8. Whether the District Court erred in failing to make findings of fact; whether findings of fact were ever made by the District Court, and whether the proceedings had herein failed to carry out the provisions requiring findings of fact to be made by District Courts.

REASONS FOR GRANTING THE WRIT

This case, under its facts, involves an important question of corporate law under the Bankruptcy Act which has not been, but should be, decided by this Court and this Court should, under its supervisory power regarding procedures in the federal courts, determine the procedure and proceedings to be had in the situation presented herein.

The original petition for the corporation under Chapter XI by the then board of directors was really a request to extend the time of the corporation to meet its obligations. It was not to be declared a bankrupt.

A corporate reorganization under the Bankruptcy Act is not a bankruptcy proceeding but a special proceeding that has as its object the rehabilitation of the debtor, the conservation of the corporation and the continuity of its business, and not liquidation of its assets. The purpose of reorganization is to save a sick business, not to bury it and divide up its belongings. If reorganization is successful, the debtor corporation will continue to function, to pay its creditors and carry on its business.

In re Susquehannah Chemical Corp., 81 F. Supp. 1 (aff. 174 F. 2d 783);

Commonwealth of Massachusetts v. Thompson, 190 F. 2d 10, 11;

Newman & Bisco v. Realty Associates Securities Corp., 173 F. 2d 609;

In re Peterson's Motor Express, 84 F. Supp. 230;

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Quick Charge, 168 F. 2d 513;

In re Pure Penn Petroleum Co., 188 F. 2d 851;

Corporate Reorganization, 63 Harvard Law Rev. 1056;

In re National Realty Trust, 167 F. 2d 440 (involving a business trust)

Instead of seeking rehabilitation, the corporation was summarily adjudged bankrupt and thus the Bankruptcy Court, in effect, took charge of all of its assets with complete power of sale, contrary to the laws of the State of California which require that a majority of the stockholders must consent to a complete sale of all of its assets.

There was no notice of any kind to any of the stockholders personally nor to the directors themselves as to the actual hearing and decision to adjudicate the corporation bankrupt. The attempt by the S.E.C. to protect the stockholders went in vain.

Notice and an opportunity to be heard are the first essences of due process of law.

In Schroeder v. New York, 371 U.S. 208, 9 L. ed. 2d 255 at 258, the Court stated that:

> "We hold that the newspaper publications and posted notices in the circumstances of this case

did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires.

"'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calulated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U.S. 457; *Grannis v. Ordean,* 234 U.S. 385; *Priest v. Las Vegas,* 232 U.S. 604; *Roller v. Holly,* 176 U.S. 398.' *Mullane v. Central *Hanover Bank & Trust Co.* 339 US 306, 314, 94 L ed 865, 873, 70 S Ct 652. In the *Mullane* Case, which involved notice by publication to the beneficiaries of a common trust fund, the Court throughly canvassed the problem of sufficiency of notice under the Due Process Clause, pointing out the reasons behind the basic constitutional rule, as well as the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.

"As was emphasized in *Mullane,* the requirement that parties be notified of preceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' 339 US at 314. The

Court recognized the practical impossibility of giving personal notice in some cases, such as those involving missing or unknown persons. But the inadequacies of "notice" by the publication were described in words that bear repeating here:

" 'Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.' 339 US, at 315.

"The general rule that emerges from the *Mullane* Case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. 'Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.' 339 US, at 318.

"This rule was applied in *New York v. New York, N. H. & H. R. Co.* 344 US 293, 296, 97 L ed 333, 336, 73 S Ct 299, where the Court pointed out that '[n]otice by publication is a poor and sometimes a hopeless substitute for actual ser-

vice of notice,' and that '[i]ts justification is difficult at best.' The rule was applied again in *Walker v. Hutchinson City,* 352 US 112, 1 L ed 2d 178, 77 S Ct 200, in a factual situation much akin to that in the present case. In Walker part of the appellant's land had been taken in condemnation proceedings, and he had been given "notice" of a proceeding to fix his conpensation only by publication in the official city newspaper. The Court held that such notice was constitutionally insufficient, noting that the appellant's name 'was known to the city and was on the official records,' and that '[e]ven a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.' 352 US, at 116.

"Decision in the case before us we think is clearly controlled by the rule stated in the *Mullane* Case, and by the specifically relevant application of that rule in the *Walker* Case. It is true that in addition to the publishing in newspapers, the city in the present case did put some signs on trees and poles along the banks of the river. But no such sign was placed anywhere on the appellant's property, or ever seen by her. The posting of these signs, therefore, did not constitute the personal notice that the rule enunciated in the *Mullane* Case requires."

This was considerably more notice to property owners in the cases cited above than was given to any stockholder or property owner in the case at bar.

Although Chapter XI of the Bankruptcy Act does not specifically list stockholders, it does list in Section 334 of the Bankruptcy Act that notice shall be given to creditors and other interested parties ten days before any hearing . This type of notice that is required must be adequate. At no time did the stockholders receive such a notice. A stockholder in a corporation is a person who has a share in the business of that corporation. He is a person who holds a proprietary interest or a share in the aggregate proprietary ownership of a corporation and as such is entitled to notice and to be heard and certainly is an interested party before the assets of a corporation may be sold and disposed of by a Trustee appointed by a Referee, without notice or without his consent or without a hearing.

Furthermore, a proceeding to convert a special proceeding to reorganize the corporation and give it a chance to be rehabilitated is an entirely different proceeding than bankruptcy and to follow up with bankruptcy is, in effect, involutary and the stockholders should have the same right to a jury trial as the statute gives to a corporation to whom involuntary bankruptcy preceeding are intended or attempetd. The proceeding here deprives the stockholders and other interested parties of the right to have such a jury trial on the question of insolvency before the corporation is adjudicated a bankrupt.

Here we have a corporation under whose declared statement there are $5,000,000 more in assets than in liabilities, although they are the type of assets that are not easily made liquid. Yet it should not be forced into a bankruptcy situation, which it was not its intent in asking the court for an opportunity to meet its obligations.

This case presents important questions of bankruptcy law and procedure which have not been, but should be, decided by this Honorable Court.

See also, on the subject of corporate reorganization under Chapter X, "Chapter X, Under What Conditions May Court Order Sale of Debtor's Assets," 23 So. Cal. Law Rev. 379; Goldstone, "Jurisdiction of Bankruptcy Court to Determine Stockholders' Vote Necessary to Approve Proposed Sale of Corporation Assets to Debtor in Reorganization," 47 Mich. Law Rev. 1005; *In re Pure Penn Oil Company,* 188 F. 2d 851.

REASONS FOR GRANTING THE WRIT

Under California law, a corporation may not dispose of all of its assets without the consent or approval of a majority of its stockholders.

General Corporation Law of Calif, Sec. 3901(b)

The initial petition in this case was merely to extend the time to meet debts that the corporation could not meet at the time of the filing of the petition. Although the notice of the Referee to the creditors indicates that it might be adjudicated a bankrupt, no such notice was ever sent to any of the stockholders and before such an adjudication should be allowed, there should be full and adequate notice to the stockholders and a hearing held thereon, which is the essence of due process of law guaranteed by the law guaranteed by the Fifth Amendment U.S. Constitution. Stockholders, as interested parties would have a right to demand a jury trial on whether the corporation is "bankrupt."

No case of this Court that we have been able to find passes on the question herein presented where a Chapter XI proceeding was sought merely to extend the time to pay debts. Stockholders might be perfectly willing to have such a proceeding providing that the corporation is *not* adjudicated a bankrupt, as was the situation in this case.

This Court should decide whether stockholders are entitled to notice and whether Section 58 of the Bankruptcy Act regarding notices, which fails to refer to stockholders or require notice to stockholders, is unconstitutional under the Fifth Amendment to the Constitution of the United States in that it fails to provide an adequate notice to stockholders of the proceedings herein taken.

Notice and an opportunity to be heard are of the very essence of due process of law.

Powell v. Alabama, 287 US 45, 77 L.ed. 158, at page 68, headnote 8.

The corporation, as appears from the record, had a very unsatisfactory appearance before the Referee. Who was representing the corporation does not clearly appear. One attorney, Mr. Bernfeld, offered to resign but was not released. Another attorney said he had not been employed and at the time of the adjudication no attorney represented the corporation.

A corporation is a person within the meaning of the due process clause of the Constitution of the United States.

U.S. v. Union Supply Co., 215 US 50, 54 L.ed. 87;

Standard Oil Co. v. U.S., 221 US 1.

Since there was a conflict of who was or was not representing the corporation, by the showing and com-

ments of the various parties, it is evident that the corporation and its 500 stockholders were not represented in a matter involving adjudicating in excess of $5,000,000.00 worth of real estate and other properties "a bankrupt."

It is important that this Court adjudicate the right of a corporation to appear through counsel as required by California law, counsel adequately chosen by the corporation and stockholders.

The right to legal counsel was wrongfully denied.

Every party has the right to appear and to conduct the proceedings, so far as he is concerned, by an attorney authorized to practice in the Court.

In re Evenod Perfumer (C.C.A.N.Y.), 67 F. 2d 878;

Mintz v. Irving Trust Co., 54 S. Ct. 455, 291 US 671, 78 L. ed. 1060;

In re Huntington & Broad Top Mountain R. & R. Coal Co., 213 F. 2d 411.

In this matter, even though technically the Court had not permitted dismissal of former counsel, the statements of such counsel is to be noted. See transcript of August 13, 1963, page 19, line 11 through page 20, line 5, to the effect he would like to resign at the present time. See transcript of August 13, 1963, page 57, line 8 through page 58, line 7, to the effect he wished to resign and had no desire to represent debtor. Said transcript page 109, lines 12 and 13 in-

dicates that he represented one of the stockholders. See transscript of August 21, 1963, page 170, line 5 through line 10, to the effect he did not desire to represent the corporation under its present involvement. Said transcript page 237, line 9 through 10 the Referee stated that he understood counsel would agree to substitution and such counsel agreed. Said Transcript page 255, lines 2 and 3, where the Referee appears to recognize that such counsel no longer represented Debtor.

In said Transcript page 205, lines 20 through 22 the Referee states that Mr. Baker is not a duly elected officer of the corporation. However, no reason is given therefore. In said Transcript page 177, lines 5 through 19, minutes of Board of Directors' Meeting of Debtor re substitution of counsel, etc. were given the Court. Same were never recognized by the Court throughout the proceeding and no reason was given therefore.

It is evident from the transcript that Debtor was not actually represented by counsel at any time herein concerned. It is submitted that error existed in refusal of the court to allow Debtor to be represented by counsel of its choice.

No real hearing was held nor notice giving as required by statute and by former court order.

Section 376 of the Bankruptcy Act provides in part:

> ". . . (2) where the petition was filed under Section 322 of this Act, enter an order, *upon hearing after notice to the debtor,* the creditors, and such other persons as the Court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this Chapter, whichever in the opinion of the Court may be in the interest of the creditors . . ." (emphasis added)

No testimony was requested, nor allowed (as desired counsel of Debtor was not allowed to represent Debtor) as to whether or not an injuction should be made or as to whether a plan of arrangement could be perfected. Debtor contends it could have proven to the Court of its ability to effect and consummate a proper plan of arrangement, and still can so do, and therefore adjudication is improper.

Where the Act requires notice, the parties are entitled to reasonable notice appropriate to the case and to a reasonable opportunity to be heard.

> *Collier on Bankruptcy,* 14th Ed., Vol 8, page 202;
>
> *Continental Bank v. Chicago Ry.*, 294 US 648.

In this matter, even though there had been a general notice given for the original date set for the first meeting and technically continued along with the first meeting continuances, no advance indication was given

Debtor that adjudication was actually to be considered. See transcript of August 13, 1963, page 3, lines 4 through 9, where the court in resume of the matter before it specified same and made no mention of adjudication or dismissal; similarly page 159 thereof as to continued date of the matters; similarly transcript of August 21, 1963, page 163, lines 3 through 7.

Attention of this Court is called to the Order of March 21, 1963, whereby the Receiver was given expanded powers not normally allowed a Receiver in such matters. The parties to the stipulation including the Receiver, which was approved by Court Order expected the project to take up to 12 months and provided upon at least 10 days notice of any petition to dismiss or to seek an adjudication. Such so called "Embarcadero" system of enlarging Receiver's rights has no statutory precedence but has been lately used locally as an aid to administration in certain cases. Its effect legally is basically unknown due to newness and lack of litigation. Under the circumstances it is submitted that the Court should lend its efforts to assure a Debtor of a full and complete hearing upon adequate real notice. Here such was not done and Debtor contends same to be an abuse of discretion and denial of due process.

We thing it is a fundamental question for this Court to determine the r i g h t of stockholders and creditors to have a full hearing on the issuue of whether a corporation should be adjudicated bankrupt after an application under Chapter XI Bankrupt Act, and that any such proceedings as took place here is summary, arbitrary and capricious and a denial of due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Chase Capital Corporation prays that this Honorable Court grant certiorari in this matter.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner

Appendix

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Chase Capital Corporation, dba Quail Valley Country Club, *Appellant,*	)	No. 19,255
vs.	)	
A. J. Bumb, Receiver, etc., et al., *Appellees.*	)	

[Oct. 6, 1964]

Appeal from the United States District Court for the Southern District of California,

Central Division.

Before POPE and BARNES, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM.

This is an appeal from an order of the District Court affirming an order of the Referee in Bankruptcy adjudging the appellant to be a bankrupt. Appellant had filed proceedings under Chapter 11 of the Bankruptcy Act seeking an arrangement under §322. Attempts at filing a plan of arrangement or securing approval of one did not materialize and after a num-

ber of hearings the appellant was adjudged a bankrupt. The propriety of such an order in a Chapter 11 proceeding is not questioned.

On this appeal appellant asserts that it was denied an opportunity to have legal counsel; that proper notice was not given to the effect that the proceedings might terminate in an adjudication of bankruptcy; that it was denied due process of law because of the claimed irregularities mentioned; and, finally, that the district judge should have made findings of fact and conclusions of law instead of merely adopting and approving the conclusions of the referee.

We find no merit in this appeal. The appellant had ample opportunity to employ counsel, actually had counsel, and no action of the court operated to deny appellant full opportunity to employ counsel as it might choose. The notice actually given conformed to the requirements of the Bankruptcy Act and was completely adequate and because of the conclusions we must reach with respect to these matters there is no basis for a claim of denial of due process. The district court was not required to enter its own findings of fact if the findings of the Referee were adopted as they were in this case. Earhart v. Callan, 9 cir., 221 F. 2d 160.

The order appealed from is affirmed.

APPENDIX "B"

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 3901, *Corporation Code of California*

§3901. *Sale or transfer of all or substantially all of assets; approval of shareholders.* A corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its property and assets except in accordance with one of the following subdivisions:

(a) Under Section 3900.

(b) Under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount

of the consideration by vote or written consent of shareholders entitled to exercise a majority of the voting power of the corporation.

However, the article may require for such approval the vote or consent of a larger proportion of the shareholders or the separate vote of a majority or a larger proportion of any class or classes of shareholders. (Stats. 1947, c. 1038, p. 2375, § 3901.)

Section 58, Bankruptcy Act

§58. *Notices.* a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of (1) all examinations of the bankrupt, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: *Provided,* That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked, and the time when they will be examined and passed upon; (6) the proposed compromise of a controversy unless the court, for cause shown, directs that notice be not sent; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act; and (8) all applicants by receivers, an-

cillary receivers, marshals, trustees, committees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: *Provided, however,* That where a creditors' committee has been appointed pursuant to this Act, the notice required by clauses (1), (4), and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

b. The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge (1) to the creditors, in the manner prescribed in subdivision a of this section; (2) to the trustee if any and his attorney if any, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last-known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective address as filed by them with the court.

c. All notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by this Act may be waived in writing by any person entitled thereto.

d. Notice to creditors may be published as the court shall direct.

e. The court shall, in every case instituted under any provisions of this Act, mail or cause to be mailed a copy of the notice of the first meeting of creditors to the district director of internal revenue for the district in which the court is located. In cases involving a bankrupt where it clearly appears on the face of the petition that the bankrupt is or was engaged in the business of transporting persons or property, the court also shall mail, or cause to be mailed, a copy of such notice to the Comptroller General of the United States. Whenever the schedules of the bankrupt, or the list of creditors of the bankrupt, or any other papers filed in the case discloses a debt to the United States acting through any department, agency, or instrumentality thereof, (except for any internal revenue obligation payable to the Secretary of the Treasury or his delegate) a notice of the first meeting shall be mailed as well to the head of such department, agency, or instrumentality.

Section 59(g), Bankruptcy Act

g. A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner

or petitioners or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in section 58 of this Act, and to that end the court shall, upon entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, shall cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information, and belief: *Provided, however,* That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

Section 376, *Bankruptcy Act*

Sec. 376. If the statement of the executory contracts and the schedules and statement of affairs, as provided by paragraph (1) of section 324 of this Act, are not duly filed, or if an arrangement is not proposed in the manner and within the time fixed by the court, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited

or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 321 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter whichever in the opinion of the court may be in the interest of the creditors: *Provided, however,* That an order adjudging the debtor a bankrupt may be entered without such hearing upon the debtor's consent.

APPENDIX "C"

A PARTIAL TRANSCRIPT OF FIRST MEETING OF CREDITORS

MR. BERNFELD: May I be heard?

THE REFEREE: Yes, Mr. Bernfeld; you may be heard.

MR. BERNFELD: I represent the debtor.

THE REFEREE: You are the attorney who filed a petition under Chapter XI of the Bankruptcy Act to effect an arrangement by the debtor with its creditors?

MR. BERNFELD: That is right. I am a special counsel for the purpose of filing Chapter XI.

I would like the record to show that Mr. McLaughlin is here, who represented one of the Perkins investments; Mr. Davidson is present, who represents one of the Perkins; Mr. Arthur Kaufman is here representing a party whose attorneys I don't know.

May I also state, and I think it would be helpful to the people attending this meeting who don't have counsel if they would understand that at the present time I would feel, and I think any general practitioner in bankruptcy can understand this, that we have an identity of interest with them; that the reason we feel

this is to try to preserve everybody's interest and it is not a hostile proceeding. I feel also that the persons attending this hearing should know that the reason the Chapter XI was filed by me was on my recommendation to do so, specifically and mainly to test the validity and legality of the transactions with the Perkins group whereby they advanced $650,000 and signed up for about $1,200,000 worth of trust deeds. It is my opinion these liens are subject to attack.

I agree with Mr. Bumb and the Court this is not the usual way we are going at it, but this is the main reason I have filed this Chapter XI.

I think it is very important that the debtor state its position on the checks that have been returned and I agree with Mr. Bumb that the checks should not have been returned by the debtor. But I would ask that the Receiver do not deposit checks for say $10. I think that the home owners know that there were some notes which specifically provide for $20 and there are prior contracts that provide for 10.

I might say also the debtor will have to amend its schedules to include a very sizable group of general unsecured creditors totaling approximately $400,000 by way of an anticipatory breach. This group represents the so-called pioneer memberships who agreed to pay $200 per membership, paying, I think, what amounted to a lifetime membership in Quail and Rainbow. Then,

if Rainbow is closed, I can't see they are entitled to be a creditor for that. We will have to amend that group and I will do so.

Again, I think I would like to correct something that Mr. Bumb stated, that is, that 200 lots are subject to trust deeds, the unsubdivided group. We do have 166 acres free and clear approximately and the 73 lots which are being sold at the present time.

The reason I suggested to my clients that we offer to raise money for the purpose of keeping the operation going is this: It is my considered opinion, from having had experience with this type of venture in the bankruptcy courts before, that, as long as you close down the facility, the whole thing goes down the drain. We are extremely anxious to avoid this not only because of the moral obligation to the home owners but because we feel that there should be a preservation of values. Once the facilities for maintaining the roads, and the roads, I might say, are owned by the debtor corporation, are closed, the maintenance of the roads, club house and pool and so forth, it will all go down the drain.

There is something which I noticed in the newspapers about an attempt to annex being made by Perris. I don't think there is any necessity to get into that at the present time. I can state this, though, to the home owners, from the conversations I have had with my clients, that there is not, in my opinion, any

desire or request that the lots be annexed to the City of Perris except the possibility of possibly one or two houses which are on a line. There is no concern in this respect because their property will be undeveloped.

My clients have offered to put up this money to pay a $1300 a week payroll which will cover the maintenance of the office, which is very important to keep the payments up to date and be able to report to the property owners how much is owed and how much is not owed and to be able to account for membership fees and so forth.

We agree with the Receiver as he has reported. We have no desire to accept the membership fees and use them at the present time. However, there is being paid and has been paid monies in connection with the maintenance of the lots already sold. These range either 10 or $20 lots. Some of these property owners have homes on the lots, and the contract with Quail Valley provided they would pay a certain maintenance fee for maintaining the facilities and the road.

If my clients do go in and put up the money to maintain that they would have earned each month, 1/12th of the amount deposited, they would like to have 1/12th allotted to them.

The appraisal is one which seeks to continue operation. The present interim appraisal does not seek to continue at the present time the Rainbow Angling Club operation.

I might say, though, that, within the time which the Court will fix, I feel and trust we will have a Plan of Arrangement on file which will not only contemplate the reopening of Quail but also the general revitalization of the whole matter.

I believe my client will testify as to why we got into trouble and I would like to call attention to Rainbow. In connection with the $100,000 note from the escrow contracts in existence, they spell out the fact they should have been paid and, if Mr. Smith has paid the $100,000, I am sure he has a check or a record of what has been paid. This is in favor of my client and there is an open and shut contract in escrow providing for the payment of this money.

On the question of the San Diego property, the San Diego property is exactly as Mr. Bumb has described it, and in that Mr. Bumb should also report that he has received a maximum of cooperation from the debtor. The San Diego property I feel should go back. I think it was an indiscreet and injurious investment and that the transcaction with the E & P group is subject to inspection and attack, and I hope a successful attack.

With respect to persons who have not been paid, that were mentioned here, they are stockholders. The corporation has outstanding 500,000 shares of stock, of which 100,000 shares are owned by the public. The public consists in some degree of home owners gener-

ally who are buying the lots. Approximately 400,000 remaining are so-called captive shares owned by the present management or controlled by the present management, some of which shares are under pledge with other groups. As I say, the shares in the hands of the public total 100,000.

I have Mr. Madsen here with me today. I recommended to Mr. Madsen some time ago that he retire from the club because he suffered a very serious heart attack and he is here contrary to the orders of his doctor, but I told him he would have to be here today or suffer the consequences. I would ask, though, the indulgence of the Court and counsel to allow him to be examined over a period of time so that physically he can respond.

THE REFEREE: Before the comments of counsel, the Court wants to point out to interested persons that it is the policy of this Court, when a petition for arrangement is filed and a Receiver is appointed, not to permit new debts to be pyramided on top of the existing debts. What the Court is primarily interested in is, first, for unsecured creditors, then other persons having a residual interest in the property, if that can be done.

So the Court has required the Receiver in this case to have certain bank accounts in which any monies which may become due can be deposited.

The Court also required and expressly admonished the Receiver that the operations herein are not to continue unless at the end of each current week he has enough money with which to defray the expenses during the succeeding week. The Receiver has pointed out that funds for that very limited purpose that he has indicated were not available.

Apparently the debtor or some of the members of the debtor corporation who own this stock and who will be benefited if the Plan of Arrangement is confirmed, as well as the unsecured creditors, are offering to contribute approximately $1300 per week, and the word "contribute" is emphasized. It is not to become a burden upon the estate either by way of expense of administration or an additional obligation of the estate ahead of the present unsecured creditors. However, the Court may consider it as a subordinated obligation and place its repayment in preferred status in the event the Plan of Arrangement is confirmed. It is possibly not entirely altruistic or magnanimous in making the offer but probably as the result of the conditions imposed by the Court.

And as to Mr. Bernfeld, the Court, in order to keep the boat from rocking, could employ a minimum crew to be maintained until the debtor has had an opportuity to present a proposed Plan of Arrangement and until time is permitted to elapse to give it due hearing and consideration. Otherwise, the Receiver would have to close the doors.